No. 600.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOUIS SALLA, FRANK BARONY, MORRIS FLYNN, FRANCIS BUTLER, NAPOLEON NEVELLA, JOHN LUCINETTI, DENNIS O'ROURKE, FRED. SHAW, PAT. ADUDELL, MIKE MALVEY, A. C. AUSTIN, JAMES CAZZAGLIO, JONH DOE PARKER, GEORGE C. CALLADGE, WILLIAM WRIGHT, ED. BOYLE, THOMAS MURRY, H. MARONI, CHARLEY GARRETT, P. F. O'DONNELL, ARTHUR WALLACE, C. J. OLSON, ED. ALBINOLA, JOHN BURT, ALEX. WILLS, PAUL CORCORAN, WILLIAM BUNDREN, JOE VELLA, MARCUS DALY, MIKE WELLS, DENNIS LARRY, PAT. GERARD, C. R. BURRIS, et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA;

Defendant in Error

BRIEF OF DEFENDANT IN ERROR.

Error to the District Court of the United States for the District of Idaho.

R. V. COZIER,
U. S. District Attorney, Counsel for Defendant in Error.

NORTH IDAHO STAR JOB ROOMS, MOSCOW, IDAHO

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The statements in the Brief of the Plaintiffs in Error, as to what the evidence in the case shows, is strikingly incomplete and entirely misleading, although we do not say that it is intentionally so.

The undisputed evidence in the case shows: that in

Coeur d'Alene mining district in Shoshone county, Idaho, there are located large silver and lead mines in operation and that these mines are located at various points in said district, namely: Burke, Mace, Gem, Mullan, and Wardner; that the mines of Burke, Mace, Gem and Mullan are situated along Canyon Creek and are known as Canyon Creek mines; that at Wardner is located the mine and milling properties of the Bunker Hill & Sullivan Mining & Concentrating Co.; that Wardner, or Kellogg Junction is on the line of the Oregon Railroad & Navigation Company, twelve miles from Wallace; that the mines at Burke, Mace, Gem and Mullan, or the Canyon Creek mines, so called, are what are known as Union mines, that is, that workers in the mines are members of the organization called the Miners Union, or more properly, are members of the organization called the Western Federation of Miners; that at these different mines are local Unions, all a part of the general organization that the Bunker Hill & Sullivan mine at Wardner was, on the 29th of April, 1899, what is known as a non-Union mine; that the Miners Union had made certain demands upon the Bunker Hill Company in the matter of employing Union men and the payment of a certain fixed scale of wages; that such demands had been refused by the Bunker Hill Company; that the Bunker Hill Company

employed non-Union men in working its mine and mill; that the various Unions, or members of the various Unions in the Coeur d'Alenes, had declared a boycott on the mine and mill of the Bunker Hill Company and that force had been resorted to and further threats made upon the part of the members of the Union to drive from their employment the non-Union men who were working for the said Bunker Hill Company; that on the 29th of April, 1899, all the Union mines in the Coeur d'Alene country ceased work; that a Northern Pacific Railway train ran from Wallace to Burke and return each day; that it was a regular train, regularly carrying the United States mail; that on the said 29th of April, 1899, this said train regularly proceeded from Wallace to Burke; that at Burke a large number of men, members of the Miners Union, boarded the train.

That as soon as the train left Burke on its return to Wallace, armed and masked men took possession of it; that the train was met at Mace, Gem, and other points which were located on the line of the Northern Pacific Railway Co., by large bodies of armed and masked men who boarded the train; that the train was stopped at a point above Mace, at the Frisco powderhouse, and took therefrom large quantities of powder; that the engineer of the train was compelled by armed men in charge of the train, after it had reached Gem,

to go again back up to the Frisco powder-house where more powder was placed aboard; that the train then proceeded down toward Wallace; that at a point about one half mile above Wallace the train was met by from two to three hundred Union miners who were employed in the mines at Mullan, six miles distant, but who had ceased work that day; that a large number of this body was armed and masked; that they boarded the train; that the engineer, acting under orders of the armed and masked men in charge, proceeded to run on to Kellogg station over the lines and tracks of the Oregon Railway & Navigation Company, a distance of twelve miles; that before the train reached Kellogg station it was stopped at various points to take aboard from two to three hundred men bearing arms and wearing masks; that these bodies of men who were waiting for this train above Kellogg station, belonged to the Miners' Union, at least largely so; that this train was an irregular train running over a foreign track and that there was no regular train due there at that time, and was entirely out of time; that by the time the train reached Kellogg station it had on board some one thousand men, several hundred of whom were armed and masked; that when the train reached the station, these men, with military precision, under orders, proceeded to the mill of the Bunker Hill Company, which

they destroyed with dynamite; that as soon as this was done the men from the various places in Canyon Creek, boarded the stolen train and proceeded back to Wallace where they dispersed; that the train seized by this body of armed and masked men was a regular train carrying the United States mail; that it was delayed, retarded and obstructed, and that the train was regularly transporting said mail when it was so seized, obstructed and delayed.

A conspiracy to commit a misdemeanor or a felony is a misdemeanor:

Bishop Crim. Law, 7 Ed. Vol. 2, 240.

Am. and Eng. Enc. of Law, 1 Add. Vol. 4, 591.

1 Greenl. Evidence, Vel. 3, Sec. 90.

Thomas v. People, 113, Ill., 531.

So a conspiracy under Section 5440 R. S. U. S., not being declared a felony by statute, is a misdemeanor:

Berkowitz v. U. S., 93 Fed. Rep. 452.

U. S. v. Gardner, 42 Fed. Rep. 829.

Section 1024 R. S. U. S. which provides that "when there are several charges against any person for the same act or transaction, or for two or more acts or

transactions of the same class of crimes or offenses which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts," etc., leaves the question to the court to determine whether in a given case a joinder of two or more offenses in one indictment against the same person is consistent with the settled principles of common law:

Pointer v. U. S. 151 U. S., 396.

U. S. v. Jones, 69 Fed. Rep. 973.

By the practice everywhere, distinct transactions in a misdemeanor may be joined in seperate counts in one indictment:

U. S. v. O'Callahan, 6 McLean, 596.

U. S. v. Devlin, 6 Blatch., 71.

Am. and Eng. Enc. Law, Vol. 4, 756.

State v. Kibby, 7 Missouri, 317.

1 Chitty Crim. Law, Sec. 254.

Kreer v. People, 78 Ill., 294.

Bish. on Crim. Pro. 3 Ed. Vol. 1, Sec. 452.

Counts charging a conspiracy to commit a misdemeanor may be joined with a count charging a misdemeanor:

Wharton Crim. Law, 9 Ed., 1387.

Thomas v. People, 113 Ill., 531.

The fact that the punishments for the different offenses set out in the different counts in the indictment are different, is immaterial:

U. S. v. Jones, 69 Fed. Rep., 971.

Exparte Hibbs, 26 Fed. Rep., 421.

Bish. Crim. Pro., 3 Ed., Vol. 1, Sec. 453.

United States v. Cadwallader, 59 Fed. 677.

The motion to compel the prosecution to elect upon which count it will proceed, is addressed to the sound discretion of the trial court and its action thereon will not be interferred with unless the discretion has been used to the manifest injury of the defendents:

Enc. Plead and Pract., Vol. 10, 551.

Wharton's Crim. Plead. and Pract. 9 Ed. Sec. 295.

In this connection Bishop in his work on Criminal Procedure (Vol. I, Sec. 458) says:

"In the famous Tweed's case, the right of such joinder was almost denied; the court deeming it unjust to require a man to answer to more than one offence—which, however, may be set out in different forms in more counts than one—on a single trial. But the doctrine of the English and most American courts is the direct reverese of this; namely, that, if a man has been engaged in a course of unlawful conduct resulting in a hundred legally distinct, petty

offences, and the executive officers of the government have determined to exercise their right, not controllable by the judiciary, to bring him to trial for all, it is a piece of sheer oppression to him to compel them to find against him a hundred indictments, and require him to stand trial a hundred times, instead of answering to all at once. Moreover, on broader views, it seems to some, and, the author submits, justly, that the joinder of distinct misdemeanors in one indictment, to be followed by the trial of all at a single hearing before a jury, and the punishment of each offence as prescribed by law, is essential to the administration of justice. So plain is all this, that, by many of the judges, even the authority to compel an election of counts in misdemeanor is denied, while others say that, in practice, it is never done. The just view, however, evidently is, that the authority exists, yet it should be exercised cautiously and only in those special cases wherein otherwise some right or interest will be put in peril."

In this case, at the conclusion of the evidence, and before the commencement by counsel of the argument to the jury, a *nolle prosequi* was entered as to the second and third counts in the indictment, leaving a verdict to be rendered only upon the first count.

The dismissal of the second and third counts re-

moved the grounds, if any there were, of the demurrer and motion to quash, so far as those two counts were concerned.

If there was any misjoinder of counts in the indictment the defect was cured when all counts but one were dismissed.

Where the offense charged in the indictment is a misdemeanor the defendants are allowed but three peremptory challenges:

R. S. U. S., Sec. 819.

The right to summon witnesses for the defense at the expense of the government is left by the statutes to the discretion of the trial court and is not subject to review:

R. S. U. S., Sec. 878.

Crumpton v. U. S. 138 U. S., 361.

Goldsby v. U. S., 160 U. S., 70.

All railways are post roads and authorized to carry mails:

R. S. U. S., Sec. 3964.

Any act or declaration of any of the defendants tending to prove the conspiracy, or the connection of that defendant with it, whether made during the existence of the conspiracy or after its completion, is

admissible against him. The conspiracy having been established prima facie, in the opinion of the trial judge, any act or declaration of any member of the conspiracy, in furtherance of the conspiracy, though he may not be a party defendant, is evidence against all the conspirators on trial. Whether a conspiracy is established prima facie is peculiarly for the consideration of the trial court:

Card v. Stata (Ind.) 9 N. E. Rep., 591.

1 Greenl. Ev. Sec. 111.

But it is not always necessary, in order to render the declaration admissible, that the conspiracy should have been first established prima facie. This cannot well be required, where the proof of the conspiracy depends upon a vast number of isolated and independent facts; and, in any case, where the whole of the evidence introduced on the trial, taken together, shows that such a conspiracy actually exists, the order in which it was introduced will be considered immaterial:

State v. Winner, 17 Kan. 298.

State v. Miller, 10 Pac. Rep. 869.

The conspiracy per se may be established in the first instance by evidence having no relation to the defendants. It may be shown by acts of different

persons, at different times and places, and by any circumstances which tend to prove it. The conspiracy and its objects having been shown, the defendants are not affected by it unless they are connected with it by proof:

State v. Winner, 17 Kan. 305.

3 Greenl. Ev. Sec. 93.

Rex vs Hammond, 2 Esp. 718.

People vs Mather, 4 Wend. 261.

2 Bish. Crim. Proc. Sections 228, 277.

Whart. Crim. Law, Sec. 1398.

Reg. v. Murphy, 8 Car. & P. 310.

Reg. v. Frost, 9 Car. & P. 129.

U. S. v. Cole, 5 McLeaan, 601.

King v. Parsons, 1 W. Bl. 391.

Card v. State, (Ind.) 9 N. E. Rep 591.

State v. McCahill, (Iowa) 30 N. W. Rep. 533 and 33 N. W. Rep. 599.

Reg. vs Bernard, 1 Fost. & F. 240.

Rosc. Crim. Ev. 414.

Rex. v. Stone, 6 Term R. 527.

Railroad Company v. Collins, 56 Ill. 212

Where a case rests upon circumstantial evidence much discretion is left to the trial court and its rulings admitting such evidence will be sustained if the

evidence admitted tends even remotely to establish the ultimate facts.

The facts and declarations of co-conspirators in execution of the conspiracy are evidence against other of their number.

Clune vs. U. S. 159 U. S. 589.

A witness cannot be cross examined as to any fact which is collateral or irrelevant to the issue merely for the purpose of contradicting him by other evidence, if he deny it, thereby to discredit his testimony.

His answer cannot be contradicted by the person who asked the question, but is conclusive against him:

1 Greenl. Ev. Sec. 449.

Whart. on Ev. Sec. 551, 559.

People v. Bell, 53 Calif. 119.

Union Pacific R'y. Co. v. Reese, 57 Fed. Rep. 291.

People v. Stalk, 1 Idaho, 278.

Shafter v. U. S. 87 Fed. Rep. 329.

The United States court has no power or authority to set aside an order made by a State Court which had complete control over the parties and the subject matter of the controversy; to do so would be a direct and positive interference with the right of the State court.

When the State court of Idaho ordered the testimony and evidence, taken before the coroner at the inquest over the bodies of James Cheyne and John Smith, sealed up and placed in the custody of the Clerk of that court, and that no one be permitted to open it without an order of the court, such order was conclusive and final: For the United States court to have issued a subpoena duces tecum to be served upon the custodian of the testimony requiring him to produce such testimony and evidence, would be, in effect, to set aside the said order of the State court. This the United States could not do

If the action of the State court, in making the order was void, or voidable, such action could only have been reviewed by the Supreme Court of Idaho:

Pierre v. Noegue, 101 U. S. 55.

Randall v. Howard 67 U. S. 269.

It is not necessary to give an instruction asked by the defense if such instruction has already been given by the court in its general instructions. A Judge is not bound to adopt the categorical language which counsel choose to put in his mouth. If the case is fairly put to the jury, it is all that can be asked.

Ayers v. Wilson, 137 U. S. 584.

When the substance of a request for an instruction has already been given by the court, the refusal of the court to give it again in different language, is not error:

Grand Trunk R'y. Co. vs. Ives, 144 U. S. 408.

N. Y. L. E. & W. Ry. Co. v. Winter, 143 U. S. 60.

Washington & G. R. Co. v. McDade, 135 U. S. 554

Ormsby v. Webb 134 U. S. 47.

Patrick v. Graham, 132 U. S. 627.

When a particular motive for the conspiracy is alleged in the indictment, it does not matter if the conspirators had additional motives other than the indictment describes. It will be sufficient for the purpose of the indictment if the motive, which it alleges, is proven, although the conspirators may have had additional motives.

The fact that one of the motives of the conspirators in seizing and delaying the train carrying and transporting the mail, was to commit an offense against the state, would be immaterial if it be proven that one of the objects of the conspiracy was to delay and obstruct such train.

United States v. Lancaster, 44 Fed. Rep. 896.

Assignments of error to admission or rejection of evidence, not quoting the particular evidence admitted or rejected, must be disregarded:

Rule 11, Rules of the U. S. Circuit Court of Appeals for the Ninth Circuit.

Respectfully submitted,

R. V. COZIER,

U. S. Attorney, for Defendant in Error.

No. 600

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

LOUIS SALLA, et al.,

PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA,

DEFENDANT IN ERROR.

Argument of Attorneys for Plaintiffs in Error.

Error to the District Court of the United States for the District of Idaho.

PATRICK REDDY,
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THE STAR PRESS—JAS. H. BARRY—SAN FRANCISCO.

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

LOUIS SALLA et al.,
Plaintiffs in Error,

vs.

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Defendant in Error.

ARGUMENT OF ATTORNEYS FOR PLAINTIFFS IN ERROR.

In pursuance of the order of the Court made and entered on the 11th day of May, 1900, granting leave to respective counsel to file arguments, we respectfully submit the following on behalf of plaintiffs in error:

The first question presented in our Brief (pp. 29 to 34, inclusive) is, did the Court err in denying defendants' motion to quash the indictment?

We have nothing to add to what is there presented, except to reply to the Brief and written argument of counsel for defendant in error upon that point.

Counsel for defendant in error contends that a conspiracy under Section 5440, R. S. U. S., not being declared a felony by Statute, is a misdemeanor, and cites the cases of Berkowitz *vs.* United States, 93 Fed., 452, and United

States *vs.* Gardner, 42 Fed., 829. (Brief of defendant in error, page 5.)

This, if correct, is a very simple test for determining the character of an offense against the United States, but the authorities cited in support of this proposition, we contend, are in conflict with the cases cited in our Brief, namely, Bannon & Mulkey *vs.* United States, 156 U. S. 464, and Reagan *vs.* United States, 157 U. S. 301. In these cases no such test was adopted.

In Bannon & Mulkey *vs.* United States, at page 468, the Court after referring to State statutes defining felony, said that in the absence of such statute the word felony is used to designate an offense formerly punishable by death or by forfeiture of the lands or goods of the offender.

In Reagan *vs.* United States, at page 303, the Court, referring to the common law definition of the word felony, and of the Statutes of some of the States, said: "These mat-" ters have thrown about the meaning of the word, as ordin-" arily used, no little uncertainty," from which it is evident that the distinction between felony and misdemeanor is not determined by the simple fact that the Statute of the United States is silent upon the subject.

Again, at page 303 it is said: "There is no statutory de-" finition of felonies in the legislation of the United States. " We must, therefore, look elsewhere for the meaning of the " term."

On the same page the Court says: "The same question " was recently before us in Bannon & Mulkey *vs.* United " States, 156 U. S., 464, 468, and Mr. Justice Brown, deliv-" ering the opinion of the Court, after referring to the

" statutory provisions in some of the States, said: 'But in " the absence of such Statute the word is used to designate " such serious offenses as were formerly punishable by " death, or by forfeiture of the lands or goods of the of- " fender.' "

It is contended by opposing counsel in his argument, at page 4, that "The Statute referred to in the above case by " Justice Brown is a Federal Statute and not a State " Statute."

We do not see how this contention can be maintained, in view of the fact that the Supreme Court of the United States declares in express terms that "Mr. Justice " Brown" * * * 'after referring to the statutory pro- " visions in some of the States, said: 'But in the absence " of such Statute the word is used to designate such serious " offenses as were formerly punishable by death, or by for- " feiture of the lands or goods of the offender.' "

We do not contend, as stated by opposing counsel in his argument at pages 3 and 4, that because an offense is infamous that it is therefore a felony, but because it is declared to be a felony by the laws of the State.

In Reagan *vs.* United States, at page 302, the Court said: "It may be conceded that the present common un- " derstanding of the word departs largely from the techni- " cal meaning it had at the old common law." The Court then goes on to state the cause and reasons for this departure in the following language: "This departure is " owing to the fact that the punishments other than death, " to wit, forfeiture of the lands or goods of the offender, " which formerly constituted the test of a felony, are no

"longer inflicted, at least in this country, and to the "further fact that in many of the States offenses are by "Statute divided into two classes, felonies and misde- "meanors, the former including all offenses punishable by "death or imprisonment in the penitentiary, and the latter "those punishable only by fine or imprisonment in a "county jail, and in other States in which no statutory "classification is prescribed, many offenses punishable by "imprisonment in a penitentiary are in terms declared "to be felonies. These matters have thrown about the "meaning of the word as ordinarily used no little uncer- "tainty."

The Court then points out the influence and facts which brought about the departure from the common understanding of the word felony as used in the old common law, and quotes from Webster's Dictionary to show the uncertainty which now surrounds the meaning of the term, and declares that there is no statutory definition of the word felony in the legislation of the United States, and that therefore the meaning of the term cannot be ascertained from that source. It then cites the opinion of Mr. Justice Brown in Bannon & Mulkey *vs.* United States in which he referred to the statutory provisions in some of the States. Why was such reference made to those Statutes if they did not afford some light upon the question of the meaning of the word felony? That was the question under consideration.

Proceeding, it is said: "But in the absence of such "Statute the word is used to designate such serious of-

" fenses as were formerly punishable by death, or by forfei-
" ture of the lands or goods of the offender."

It was only in the absence of such Statute that it became necessary to determine the character of the offense by the means last referred to.

In the case of Berkowitz *vs.* United States, 93 Fed, 452, the case of Reagan *vs.* United States, 157 U. S., 301, wherein the case of Bannon & Mulkey was commented upon and explained, was not cited by the Court.

II.

The second question presented in our Brief (pages 34 to 37 inclusive) is, did the Court err in denying defendants' motion to require the prosecution to elect upon which count of the indictment it would proceed?

The law upon this subject is clearly stated in McElroy *vs.* United States, 164 U. S., 76, 80, in which Section 1024, R. S. U. S. is considered and its meaning determined.

We have already shown in our Brief that the indictment charges separate and distinct offenses in the several counts. The Court has no discretionary power or authority to consolidate indictments or to allow counts to be joined in one indictment, unless authorized by Section 1024, R. S. U. S.

The affidavit of the defendant, O'Rourke, shows that his witnesses were expected to prove that he was at his home in Wardner and had nothing to do with the alleged stoppage of the trains mentioned in the second and third counts, and all the evidence in the case in relation to him was upon that question. On the trial no evidence was offered to show any

participation on his part in any of the transactions between Burke and Wallace, and all the evidence shows that if there was a conspiracy to obstruct or retard the mail it was completed and fully executed when the train from Burke reached Wallace on the morning of the 29th of April, 1899. All the evidence, both on the part of the prosecution and defense shows that he was in the vicinity of Wardner.

The conspiracy and the acts done under it were completed when the train from Burke reached Wallace. Thomas Chester, the only witness who testified upon this point stated (Tr., p. 179): "The mail was on board in the "morning coming from Burke to Wallace. It was in the "baggage car in my charge. I took it off at Gem and put on "the Gem mail and took it off at Wallace; took off the "Burke mail at Wallace."

No mail was carried on the train from Wallace to Wardner on the down trip and no mail was carried from Wardner to Wallace on the return trip.

The first count of the indictment charges but one offense, if any, namely, a conspiracy to commit an offense against the United States by obstructing and retarding the movement and passage of a certain railway car and train over the lines and tracks of the Northern Pacific Railway Company, etc. Wallace is the western terminus of that branch of the Northern Pacific Railroad. (Tr., p. 176.) The train referred to in proceeding from Wallace to Wardner passed over the lines of the Oregon Railway & Navigation Company. (Tr., p. 176.) The theory of the prosecution was that the defendant O'Rourke and all the defendants, with the exception of Malvey and Wallace, obstructed the train,

if at all, at Wardner. It is not contended that they were at Wallace, or at any point between Wallace and Burke, when the train was obstructed and they could not have been parties to the conspiracy alleged in the indictment, for the reason as above stated, that the object of that conspiracy was effected and completed and the entire transaction closed when the train reached Wallace. In the second count of the indictment it is alleged that the defendants actually obstructed the passage of the mails of the United States by stopping and delaying a certain car and train containing the mails of the United States, which railway car and train was then and there being run and transported over the railway lines and tracks of the Northern Pacific Railway Company. The allegation as to the place where the offense was committed is material, because descriptive of the offense. The lines and tracks of the Northern Pacific Railway Company, as above stated, do not extend beyond Wallace, and there is no evidence to show that any of the defendants, except Malvey and Wallace, were at Wallace or at any point between Wallace and Burke at the time in question. The great mass of evidence concerning the transactions at Wardner Junction and immediate vicinity had no bearing whatever upon either the first or second counts. In the third count the defendants are charged with obstructing and retarding the passage of the mails of the United States by stopping and sidetracking a certain railway car and train then being run and transported over the lines and tracks of the Oregon Railway & Navigation Company by the said Oregon Railway & Navigation

Company. The prosecution by refusing to elect simply used the third count to secure the admission of evidence of a character highly prejudicial to the defendants, for instance, the blowing up of the Bunker Hill & Sullivan Mill, the killing of Cheyne and Smith, and the testimony of the witness Pipes (Tr., p. 279), that he heard exclamations as the mill was blown up of "Down with America," and "To " Hell with America," all of which was calculated to excite and prejudice the jury to the highest degree. That evidence did not tend to prove the conspiracy alleged in the first count, nor to prove any act to effect the object of said conspiracy. The overt acts under said conspiracy, charged against said defendants, are stated in the first count of the indictment. The overt acts alleged must be proved as laid. The allegation that the defendants to effect the object of the conspiracy stopped the railroad car described, cannot be established by proof that they blew up a quartz mill miles away, or that they committed murder by killing persons in the vicinity of that mill, and who had nothing to do with the railway car, or that the persons engaged in such crimes cried "Down with America," nor could any such evidence be admitted to prove the second count in the indictment.

If the prosecution had elected in the first instance to proceed upon the first count against the defendants, upon what theory or pretense could the evidence referred to have been admitted in support of that count?

All the evidence, both for the prosecution and defense, shows that all of the defendants, with the exception of Malvey and Wallace, were in the vicinity of Wardner on

the 29th of April, 1899, and could not have participated in the acts charged in the first and second counts of the indictment.

The refusal to elect could only serve one purpose, and that was to prejudice the defendants.

Counsel for defendant in error, in his written argument at page 8½ says: "The second and third counts were dis- "missed by the District Attorney upon the close of the "evidence in the case, and before the case was given to the "jury. The Court thereafter instructed the jury that they "were to 'consider only the first count in the indictment "just as if there had never been the other two counts in the "indictment.'" (Tr., p. 24.)

The instruction of the Court did not cure the error or relieve the defendant in the least of the prejudice created by the admission of the evidence under the second and third counts. The jury were told to disregard the second and third counts, but they were not instructed to disregard the evidence which had been admitted in support of those counts, nor were they informed as to what part of all the evidence which had been admitted was applicable to the first count, but were left to consider the entire mass of evidence as applicable and competent to support the first count in the indictment. We do not think it can be successfully denied that evidence was admitted under the second and third counts which was inadmissible in support of the first count and the jury were left to determine whether part or all of the evidence should be considered under that count; all of which we respectfully submit could not fail to confuse the jury and prejudice the defendants.

III.

The Court erred in overruling the demurrer of the defendants' to the indictment. (Tr., p. 9.)

This point is discussed in the Supplemental Brief of plaintiffs in error.

The facts stated in the indictment do not constitute an offense against the United States.

Counsel for defendant in error passes this point with the remark: "We think a reading of the indictment, which counsel contend is defective, will fully establish the correctness of the Trial Court in overruling the demurrer to the indictment, and also in overruling defendants' motion for an arrest of judgment." (Argument of defendant in error, p. 22.)

By reading the indictment it will appear that the object and purpose of the conspiracy is clearly defined and stated in the following language: "* * * did then and there "unlawfully, wickedly and maliciously, confederate and "conspire together to commit an offense against the United "States, that is to say, to unlawfully, willfully, mali-"ciously, and knowingly delay, prevent, obstruct, and re-"tard the movement and passage of a certain railway car "and train over the lines and tracks of the Northern Paci-"fic Railway Company by the said Northern Pacific Rail-"way Company." (Tr., p. 2.)

This is all that is charged in the indictment with reference to the object and purpose of the conspiracy. The recital which follows does not enlarge the scope of the conspiracy or affect it in any way.

The recital is as follows: "The said Northern Pacific "Railway Company then and there being engaged in the "business of a common carrier of the mails of the United "States, which said railway car and train were then and "there carrying and transporting the mails of the United "States," without any averment or charge that the defendants were cognizant or knew of such facts.

This is not equivalent to averring that the object of the conspiracy was to willfully and knowingly obstruct and retard the passage of the mails of the United States, or a carrier thereof.

To constitute a good indictment under Section 5440 R. S. U. S., it must be alleged that the conspiracy was to do some act made a crime by the laws of the United States, and it must state with reasonable certainty what the acts intended to be effected and carried out by the agreement of the parties were, so that it can be seen that the object of the conspiracy was to commit a crime against the United States.

A statement of the object of the conspiracy is a requisite of the indictment.

In re Wolf, 27 Fed., 611.

It is not sufficient to allege in the language of the Statute a conspiracy to commit an offense against the United States. It must go further and describe the offense intended to be committed. If it was intended by the prosecution to state an offense under Section 3995, all of the elements of that offense should be alleged.

Section 3995, R. S. U. S., reads as follows: "Any person "who shall knowingly and willfully obstruct or retard the "passage of the mail, or any carriage, horse, driver, or car- "rier carrying the same, shall, for every such offense, be "punishable by a fine of not more than one hundred "dollars."

To constitute a sufficient indictment under Sections 5440 and 3995 it should be alleged that the defendants conspired and agreed to commit an offense against the United States, to wit, knowingly and willfully to obstruct and retard the passage of the mails of the United States.

U. S. *vs.* Debs, 65 Fed., 210.

Scienter is an essential ingredient of the offense described in Section 3995, R. S. U. S.

It is not alleged that the defendants knew that the Northern Pacific Railway Company was engaged in the business of a common carrier of the United States mails. It is simply averred that "said Northern Pacific Railway "Company then and there being engaged in the business of "a common carrier of the mails of the United States, which "said railway car and train were then and there carrying "and transporting," etc.

In Johnson *vs.* State, 26 Tex., 117, it is held that an indictment for an assault on a person named, then and there being an officer in the lawful discharge of his duty, is insufficient as a charge of aggravated assault, because failing to show that it was known or declared to the defendant that the person assaulted was an officer discharging his official duties.

Upon this question there is a full review of the authorities in the case of Pettibone *vs.* U. S., 148, U. S., 197.

The conspiracy must be set out in such manner as to show that it is within the terms of the Statute.

4 Ency. of Pl. and Pr., p. 713, and cases cited in Note 4.

Obstructing and retarding the passage of the mails of the United States is not an offense unless it was done knowingly and willfully.

"The Statute of Congress by its terms applies only to "persons who 'knowingly and willfully' obstruct or retard "the passage of the mail, or of its carrier; that is, to those "who know that the acts performed will have that effect, "and perform them with the intention that such shall be "their operation."

U. S. *vs.* Kirby, 7 Wall., 485-6.

Knowledge is an essential ingredient of the offense described in Section 3995 R. S. U. S., and should be directly, accurately, clearly and positively alleged and not left to inference.

U. S. *vs.* Cruikshank, 92 U. S., 542, at pages 556-7.

In United States *vs.* Claypool, 14 Fed., 127, the indictment charges the defendant with knowingly and willfully obstructing and retarding the passage of the mails. The Court said: "The offense here denounced is the knowing "and willful obstructing of the passage of the mail. I have "already spoken of the meaning of the terms 'knowingly

"and willfully,' and add by way of further explanation "that they are used in contradistinction to innocent, ig- "norant, or unintentional; so that the defendant, Clay- "pool, by the acts he did, may have obstructed and retard- "ed the mail in its passage, yet he is not guilty under the "law if he did it innocently and without intending to do "so."

In U. S. *vs.* Woodward, 44 Fed., 592, the defendant was on trial for knowingly and willfully obstructing and retarding the passage of the mail * * * The Court instructed the jury that in order to convict the defendant they must believe from the testimony that he knew that his acts on that occasion would have that effect, and that he performed them with the intention that such would be their operation.

See also Meiveilles *vs.* Banning, 2 B. & A. D., 909.

The question presented here is one of pleading, and the rule is well settled that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication.

Pettibone *vs.* U. S., 148 U. S., 202;
Blitz *vs.* U. S., 153 U. S., 308.

Under Section 5440 R. S. U. S., the conspiracy must be sufficiently charged and cannot be aided by an averment of acts done by one or more of the conspirators in furtherance of the object of the conspiracy.

U. S. *vs.* Brittan, 108 U. S., 199.

Under Subdivision 5 of the special demurrer to the first count of the indictment it is claimed that the indictment is insufficient, for the reason it does not appear that the said Northern Pacific Railway Company was authorized by law or by the United States to carry the mail of the United States in said car or over the lines or tracks described in said count, or that said Northern Pacific Railway Company was ever authorized by law or by the United States, or otherwise, to carry said United States mails over said lines or tracks, or elsewhere, or that said United States mail was ever delivered to said Northern Pacific Railway Company for carriage from any one place to another or from any one postoffice to another. (Tr., pp. 11, 12.)

The averment that the Northern Pacific Railway Company was engaged in the business of a common carrier of the mails of the United States does not show any authority on the part of said company to carry the mails of the United States.

There is no such business or calling as that of a common carrier of the mails of the United States. Common carriers are such as carry goods for hire indifferently for all persons.

Bouvier's Law Dictionary, Vol. 1, Title, Common Carriers, page 299.

A carrier for one person alone is not a common carrier, and the mails of the United States can only be carried for one party, to wit, the Government of the United States.

In the case of United States *vs.* Porter, 3 Day's Reports, 283, at page 286, it is said, "Edwards, J., was of opinion "that no prosecution for obstructing the passage of the

" mail could be supported without showing a written con-
" tract with the postmaster general.

" Livingston, J., inclined to think that an indictment
" might be framed so as to subject the defendant, without
" proof of a written contract. Yet as this indictment states
" a contract, which is not impertinent or foreign to the
" cause, he was clearly of opinion that it ought to be proved.
" The Court will be more strict, he added, in requiring
" proof of the matters alleged in a criminal than in a civil
" case. Livingston, J., instructed the jury to acquit."

Whether the said company was carrying the mails under the sanction of the postal authorities was a material question.

United States *vs.* Cassidy, 67 Fed., 780.

Authority for carrying the U. S. mails can only be conferred by contract.

The Postmaster General is authorized to contract for carrying the mail on all post roads as often as he may think proper.

R. S. U. S. Section 3965.

The Postmaster General may make contracts with any railroad company without advertising.

R. S. U. S. Section 3942.

Section 3964, R. S. U. S. declares that all railroads or parts of railroads which are now or hereafter may be in operation are post roads, but the owner of a railroad, because it is a post road, is not authorized to carry mail unless directed so to do by the Postmaster General. The Act of March 3, 1879, 20 Stats. at Large, 358, provides that the Postmaster General shall in all cases prescribe on what

trains and in what manner the mail shall be conveyed. The provisions of law applicable to the transportation of the mails on the Pacific Railroads provide that certain railroad companies shall transport mails for the government whenever required to do so by any department thereof.

U. S. *vs.* Cassidy, 67 Fed., 704.

There is no averment in the indictment that any contract was ever entered into between the Government of the United States and the Northern Pacific Railway Company for carrying the U. S. mails, or that said company was ever ordered, requested or required by the Postmaster General to carry the United States mail.

Not only is there a failure to allege any contract for carrying the mails between the United States and the Northern Pacific Railway Company, but there is a failure to allege or show the existence of any person competent to enter into a contract with the United States for the carrying of the mail, or for any other purpose, or to show the existence of any one competent to act as a carrier of the United States mail. The name "Northern Pacific Railway " Company" does not indicate the existence of a natural or artificial person.

Proprietors of the Mexican Mill Co. *vs.* The Yellow Jacket Silver Min. Co., 4 Nev. 40, Hawley Ed., 553.

There is no allegation that the Northern Pacific Railway Company was a corporation, which is a material fact.

U. S. *vs.* Cassidy, 67 Fed., at p. 780.

The facts stated in the indictment being insufficient to constitute an offense against the United States, the trial

Court had no jurisdiction over the defendants or the subject matter of the action.

Pettibone *et al.* United States, 148 U. S., 197.

IV.

The fourth question presented in our Brief is in reference to the number of peremptory challenges allowed the denfendants. (Tr., p. 357.)

The number of peremptory challenges to which the defendants were entitled depends upon whether the offense charged in the first count of the indictment is a felony, and that point is fully discussed under Point 1, of our Brief.

V.

This point refers to the action of the Court in limiting the number of witnesses requested by the defendants to be subpoenaed at the expense of the Government. (Tr., p. 357.)

We have discussed this question in our Brief at pages 38, 39, and have only to add that the Court improperly exercised its discretion in denying the request of the defendants.

VI.

This point raises the question whether the Court erred in denying the defendant's request for a subpoena *duces tecum* directing H. M. Davenport to appear in Court and bring with him the testimony of certain persons, and is discussed in our Brief at pages 39 to 46 inclusive.

In connection with what is there said we beg leave to submit the following: Each of the defendants moved the Court that a subjoena *duces tecum* be issued and served upon H. M. Davenport, Clerk of the District Court of the First Judicial District of the State of Idaho, commanding him to appear and bring with him certain testimony therein described. The motion was supported by an affidavit on the part of each of the defendants, showing the necessity for the testimony of Mr. Davenport and the documents referred to.

The Court allowed (Tr., pp. 92 to 120) twenty witnesses for the defendants to be subpoenaed at the expense of the government, but refused to allow a subpoena *duces tecum* for Mr. Davenport, thereby denying to the defendants the right to select Mr. Davenport as one of that number. (Tr., pp. 68, 120, 317.)

The Court in its ruling clearly indicated and stated that the defendants were not entitled to the documents specified in the affidavits, namely, the testimony taken at the coroner's inquest, and that the Court had no power to enforce the production of said documents.

At page 319 of the Transcript the following appears: "The Court: We will not have any more of this before the "jury. I see what the object is. It was clearly shown "before here, that this testimony was in the hands of the "State, and that this Court, as I have clearly before "expressed myself, would have had to come in conflict with "the authorities of the State to get that testimony, and it "is not necessary now to place anything more in the "record."

It is true the application was made for process for Mr. Davenport and the documents at the expense of the Government under Section 878, R. S. U. S., but the Court held that the defendants were not entitled to process at all, and that the Court would not compel the witness to attend or enforce the production of the documents in any event, for the reasons stated. Therefore it would have been idle for the defendants to attempt to obtain from friends sufficient means to pay the expenses of serving a process which the Court had already declared it would not enforce.

If the Court had placed its ruling upon the ground that the defendants were not entitled to process at the expense of the government, that would have been a matter within the discretion of the Court, but the ruling of the Court was far more comprehensive than the motion. It went further and decided that it would not issue the subpoena or compel the production of the documents for other reasons stated by the Court.

The facts alleged in the affidavits concerning the contents of the documents in question, and the materiality thereof, were not denied or questioned by the prosecution.

The motion was opposed by the United States attorney on behalf of the plaintiff and J. H. Forney, Esq., on behalf of the State of Idaho. (Tr., p. 68.) No grounds were stated for opposing the motion, and the defendants being anxious to know the reasons of the prosecution for such opposition called J. H. Forney, Esq., who testified: "I was acting "County Attorney for Shoshone county for quite a time, "and think I was appointed about the 29th of May. It was "at the beginning of Court up there. I directed the prose-

"cution of the case that was tried there at Wallace and "directed the action with reference to all State indict- "ments. At the close of the Paul Corcoran case an order "was made by the Court to seal up all the testimony taken "at the inquest on the bodies of Cheyne and Smith, before "the Coroner. That was done upon my motion. Since that "time and during this trial I appeared here to oppose the "granting of an order by this Court for a subjoena *duces* "*tecum* to the clerk of that Court to bring that testimony "here. I appeared here specially for that purpose on the "grounds that this subpoena was directed to the officer in "whose custody this testimony was, in Shoshone County, "and as it would materially interfere with the prosecu- "tions in that county, which are now pending. There are "no cases being tried there, but there was quite a number "of indictments. I think some of these defendants are "indicted also. I opposed it on that ground; the publica- "tion of that testimony would expose the entire line of "prosecution in behalf of the State as to these defendants, "a large majority of whom are not in custody." (Tr., pp. 272, 273.)

It will be seen from this that Mr. Forney claimed to represent the State of Idaho in all the cases referred to and appeared specially in the trial Court to make known the opposition made by the State and the reasons therefor, namely, that the use of the testimony would expose the entire line of the prosecution in behalf of the State. What did the State have to conceal from the defendants? Were not the defendants entitled to know the entire line of the prosecution when it came to the trial of the case and to

have any documents in the possession of the State tending to prove their innocence or impeach witnesses produced against them?

The Court, however, did not base its ruling upon grounds so manifestly unreasonable and unjust. It held that the testimony was in the hands of the State and that it would have to come in conflict with the authorities of the State to obtain the testimony. (Tr. p. 319.)

Counsel for defendant in error, in his argument at p. 11, endeavors to support the ruling of the Court upon the ground that the United States Court has no power or authority to set aside an order made by a State Court which had complete control over the parties and subject matter in controversy; that to do so would be a direct and positive interference with the rights of the State Court.

We quite agree with counsel in this statement of the law, but the question still remains, did the District Court of the State of Idaho in and for Shoshone County have complete control of the parties, or any of them, or the subject matter? The testimony of Mr. Forney shows that at the close of the Paul Corcoran case an order was made by the Court to seal up all the testimony taken at the inquest on the bodies of Cheyne and Smith, and that the order was made upon the motion of Mr. Forney. (Tr., p. 272.) The affidavit of the defendant O'Rourke, and of all the other defendants, shows that at the time said document was filed with the clerk, the District Court of Idaho ordered that said package containing said testimony should be sealed and no one permitted to open it without an order of the Court. There was no order that it should be placed in the

custody of the Court, but simply that it should be sealed up and no one permitted to examine it, or copy it, without an order of the Court.

The order was not made in the trial of any action or proceeding. It was made exparte on motion of Mr. Forney, in the absence of the defendants. There was no action or proceeding pending to which the defendants were parties. There is no law in the State of Idaho authorizing the District Court, or any Court, to seal up any public record or public document. There is no law in Idaho authorizing any Court to seal up or conceal the testimony taken at a coroner's inquest, or in any other judicial proceeding, or to deny any person accused of crime access to any document or public writing, to assist a prosecution, or obstruct a defendant in preparing and presenting his defense.

Evidence which may effect the life, liberty or rights of a human being is not the property of the State of Idaho: it belongs to the cause of right and justice, and the order of the District Court named was absolutely void upon its face, and for that reason the Court below had the right to ignore and disregard it.

In proceedings on habeas corpus where a person is deprived of his liberty under the order of any Court, void on its face, it will be disregarded and the person restrained restored to his freedom.

We think this doctrine is of universal application.

Assignments of error VII. to XLVIII. inclusive we have argued in our Brief, and will not further discuss the questions therein referred to.

VII.

As to Assignment of Error L. which appears in our Brief at page 64, we wish to add to what there appears, that the time of arrival and departure of the mail is to be registered and kept by the postmaster.

R. S. U. S., Section 3841.

Postal Rules and Regulations, page 331, Sections 852, 854.

The witness testified as to railroad time and not the schedule time as fixed by the Postal Department. Whether the passage of the mail was obstructed or retarded is to be determined by schedule and not railroad time, and the register required by law to be kept is the best evidence.

Assignments of Error LI. to LXVI. inclusive we will not further discuss.

Counsel for defendant in error contends in his argument (p. 15) that the rulings of the trial Court on the admission and rejection of evidence were correct, and that no error was committed that would in any way prejudice the rights of the defendants.

In reply to the argument of counsel upon this point we beg leave to call attention first to the allegations in the count of the indictment as to the scope and purpose of the conspiracy, and second, as to the particular place where the offense was intended to be committed.

The allegation in said first count is that the defendants "did then and there unlawfully, wickedly, and maliciously "confederate and conspire together to commit an offense "against the United States, that is to say, to unlawfully,

"willfully, maliciously, and knowingly delay, prevent, "obstruct, and retard the movement and passage of a cer- "tain railway car and train over the lines and tracks of the "Northern Pacific Railway Company * * * "

In this case the place named is matter of essential description. It must be truly alleged and proved as laid.

Bishops New Crim. Proc. Vol. 1, Section 373, subd. 3 and note 4.

In State *vs.* Smith, 5 Harring. (Del.) 490, the Court observed, "Unless time or place enter into the crime itself "it is not material to state or prove it. The locality of a "road enters into the charge of obstructing it."

Evidence of a conspiracy to obstruct and retard the movement and passage of a railroad car over the lines and tracks of the Oregon Railroad and Navigation Company, or any other railway than the one named, would not be competent or admissible in support of this count.

It is also alleged that "to effect the object of the said "conspiracy, the said defendants, on the 29th day of April, "A. D. 1899, * * * did then and there unlawfully, "forcibly, maliciously, and knowingly delay, arrest, "obstruct, and retard the movement and passage of a cer- "tain railway car and train over the lines and tracks of the "Northern Pacific Railway Company, by the said company " * * * ."

These allegations must be proved as laid.

The town of Wallace is the western terminus of that branch of the Northern Pacific Railway, and the line extends northeasterly to the town of Burke, about seven miles distant. (Tr., p. 173.) There is no evidence of any inter-

ference with any car or train on said railroad line except on the morning of the 29th of April, 1899, on the run or trip from Burke to Wallace. Thomas Chester testified that he was in charge of the mail that morning; that he took it off at Gem and put on the Gem mail and took of the Gem and Burke mail at Wallace. (Tr., p. 179.)

This is the only evidence upon this particular point.

Wallace is the eastern terminus of the branch of the Oregon Railroad and Navigation Company in Shoshone County, which extends from Wallace in a westerly direction to Wardner Junction, and beyond. The distance between Wallace and Wardner Junction is about eleven miles. (Tr., p. 183.) When the train from Burke reached Wallace on the morning of the 29th of April, 1899, and after all the United States mail had been removed from the train, a party of armed and masked men compelled the conductor and trainmen to proceed with said train over the track of the O. R. & N. Co., to Wardner Junction, where the train was detained about three hours, (Tr., p. 176) while the armed and masked men proceeded to destroy the Bunker Hill & Sullivan Mill and commit the other crimes described in the evidence, after which they returned to the train and proceeded to Wallace, and there dispersed. (Brief of Defendant in Error, page 5.)

There was no United States mail on the train from the time it left Wallace, until its return, and there is no evidence that any mail was delivered for carriage, or carried, from Wallace to Burke on the afternoon or evening of that day.

The testimony of L. W. Hutton shows that the train did not reach Burke on time that evening, but that the delay was caused by switching at Wallace. (Tr., p. 185.)

There is no evidence that any train carrying United States mail on the railroad mentioned in the first count of the indictment was ever obstructed or retarded, either before or after the 29th of April, 1899, or at any time, except on the run from Burke to Wallace on the morning of that day. Therefore if there was a conspiracy, as alleged, its purpose and object was effected and accomplished when the train from Burke reached Wallace that morning, and the mail delivered at that station.

All of the evidence admitted by the Court as to the acts and declarations of the parties who captured the train at Wallace and who committed the other crimes at Wardner Junction in blowing up the Bunker Hill & Sullivan Mill, etc., was incompetent and inadmissible against any of the parties charged with conspiracy under the first count of the indictment, for the reason that that conspiracy had been completed and the transaction closed before the commission of the acts or the making of the declarations referred to in the evidence; hence said acts and declarations were not within the purpose and scope of the alleged conspiracy. Said acts could not have served to effect the object of the alleged conspiracy, and the acts and declarations of any one of the persons participating in the commission of said crimes or in making such declarations was inadmissible as evidence against any one except the individuals perpetrating the acts or making the declarations.

In the case of Logan *vs.* United States, 144 U. S., 263, it

was held and decided that "upon an indictment for con-
" spiracy the acts and declarations of one conspirator made
" after the conspiracy has ended and not in furtherance of
" the conspiracy are not admissible in evidence against the
" other conspirators."

To the same effect is People *vs.* Irwin, 77 Cal., 494.

The Court erred in the admission of another line of evidence. The testimony of the witnesses Burch, (Tr., p. 137) Ames, (Tr., p. 127) Taylor, (Tr., p. 146) Rouse, (Tr., p. 147) and Sutherland (Tr., p. 149) in relation to occurrences at the Bunker Hill & Sullivan mine and vicinity on the 23rd and 26th of April, 1899, and prior to the 29th day of that month, was incompetent and immaterial for the reason that it was prior to the inception of the conspiracy mentioned in the first count of the indictment, and was incompetent to prove either the conspiracy or to bind any of the alleged conspirators. The indictment charges that the defendants, "and others whose true names are to the " grand jurors unknown, on the 29th day of April, A. D. " 1899, did then and there unlawfully, wickedly and malici-
" ously confederate and conspire together to commit an
" offense against the United States * * *." This allegation fixes the time when the alleged conspiracy was formed, and there is no evidence to contradict that averment, or to show that the conspiracy was formed at any time prior to the day named, and therefore the prosecution was bound by that statement.

We do not contend, nor do we deem it necessary to argue that the United States could not, under that allegation, have adduced evidence to show that it was formed on some

day prior to the 29th of April, but no such evidence was offered and the prosecution is bound by the allegation as to the time when the conspiracy was formed.

As we have heretofore had occasion to say, there was no evidence to prove that the conspiracy alleged in the first count of the indictment was ever entered into by the defendants or any of them, or by the defendants and any other persons. The prosecution proceeded upon the theory that a conspiracy was entered into by certain parties to drive away the employees of the Bunker Hill & Sullivan Mining and Concentrating Company and to blow up its mill, a conspiracy differing entirely from the one charged in the first count of the indictment. The Court instructed the jury upon this line. (Tr., pp. 346-7-8.)

The allegation in the first count of the indictment, we think, established conclusively the time when the conspiracy was formed, consequently the admission of the testimony of the witnesses above referred to, concerning the transactions between the Bunker Hill & Sullivan Mining and Concentrating Company and others, was incompetent and irrelevant, for the reason that the occurrences did not relate in any way to the conspiracy alleged.

Wright on Conspiracy, p. 217;
People *vs.* Irwin, 77 Cal., 494;
Logan *vs.* United States, 144 U. S., 263.

The acts and declarations of the alleged conspirators made before the conspiracy was formed are not admissible to prove the fact of the conspiracy. No declaration of a co-conspirator, except those made during the pendency of the

conspiracy, and in furtherance of its objects, can be used against a co-conspirator.

People *vs.* Irwin, 77 Cal., 494.

"If the acts and declarations of a conspirator with the "accused are made in his absence, they are not admissible "against him to prove either the body of the crime, or the "existence of the alleged conspiracy, unless they either so "accompany the execution of the common criminal intent "as to become part of the *res gestae,* or in themselves tend "to promote the common criminal object. The acts "and declarations of a conspirator to be admissible in evi- "dence to charge his fellows must have been concomitant "with the principal act and so connected with it as to con- "stitute part of the *res gestae.*"

Wright on Conspiracy, p. 217.

Counsel for defendant in error sets forth certain instructions given by the Court to the jury and contends they are correct. At pages 19 and 20 of his argument it is said, "The above instructions were correct and in line with "the authorities. It was not necessary to prove that the "defendants entertained a specific intent to violate Section "3995, R. S. U. S., or that they had such intention in mind "when they conspired to seize, obstruct and delay the pas- "sage of the railway train carrying the mail, as set out in "the indictment," and cites the case of U. S. *vs.* Kirby, 7 Wall., 485.

In that case the defendants were charged not with a

conspiracy, but with knowingly and willfully obstructing and retarding the passage of the mail, and it was there held that the acts described in Section 3995, R. S. U. S., must be knowingly and willfully done, and that the section applies only to those who know that the acts performed will have that effect and perform them with the intention that such shall be their operation. The Court held however, that when the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object.

The same may be said of United States *vs.* Cassidy, 67 Fed., 698, and United States *vs.* Debs, 65 Fed., 211, but none of these cases apply to a charge under Section 5440, R. S. U. S.

We repeat that the point decided in these cases is as to the actual fact of obstructing and retarding the passage of the mail. The gist of this action is the conspiracy, and it makes no difference whether the United States mail was actually obstructed or not. It is only necessary that an act to effect the object of the conspiracy be performed by one or more of the alleged conspirators, and that act need not be criminal.

Wright on Conspiracy, p. 132.

It is contended by counsel for defendant in error in his argument at page 19, "It was not necessary to prove that "the defendants entertained a specific intent to violate "Section 3995, R. S. U. S. * * *" In the case of Pettibone *vs.* United States, 148 U. S. at page 207, a complete

answer to this contention will be found, where the Court said; "It is insisted, however, that the evil intent is to be "found, not in the intent to violate the United States "Statute, but in the intent to commit an unlawful act, in "the doing of which justice was in fact obstructed, and "that, therefore, the intent to proceed in the obstruction of "justice must be supplied by a fiction of law. But the "specific intent to violate the Statute must exist to justify "a conviction, and this being so, the doctrine that there "may be a transfer of intent in regard to crimes flowing "from general malevolence has no applicability."

And again, at page 209: "While offenses exclusively "against the States are exclusively cognizable in the State "Courts, and offenses exclusively against the United "States are exclusively cognizable in the Federal Courts, "it is also settled that the same act or series of acts may "constitute an offense equally against the United States "and the State, subjecting the guilty party to punishment "under the laws of each government. Cross *vs.* North "Carolina, 132 U. S., 131, 139. But here we have two "offenses, in the character of which there is no identity; "and to convict defendants of a conspiracy to obstruct and "impede the due administration of justice in a United "States Court, because they were guilty of a conspiracy to "commit an act unlawful as against the State, the evil "intent presumed to exist in the latter case must be im- "puted to them, although ignorance in fact of the pendency "of the proceedings would have otherwise constituted a "defense, and the intent related to a crime against the "State.

"The power of the United States Court was not invoked "to prohibit or to punish the perpetration of a crime "against the State. The injunction rested on the jurisdic- "tion to restrain the infliction of injury upon the com- "plainant. The criminal character of the interference may "have contributed to strengthen the grounds of the appli- "cation, but could not and did not form its basis.

"The defendants could neither be indicted nor convicted "of a crime against the State, in the Circuit Court, but "their offense against the United States consisted entirely "in the violation of the Statute of the United States by "corruptly, or by threats or force, impeding or obstructing "the due administration of justice. If they were not guilty "of that, they could not be convicted. And neither the "indictment nor the case can be helped out by reference to "the alleged crime against the State, and the defendants "be punished for the latter under the guise of a proceeding "to punish them for an offense which they did not com- "mit.

It might be conceded, for the purposes of the argument, that if the conspiracy against the Bunker Hill & Sullivan Mining and Concentrating Company was established, and that in carrying out the conspiracy the conspirators knowingly and willfully obstructed the passage of the United States mails, or a carrier thereof, that they might be prosecuted and convicted under Section 3995, R. S. U. S.; not for conspiracy, because that was an offense against the State, but for the actual interference with the mail of the United States under the section last named, but that of-

fense is an entirely different and distinct offense from that charged in the indictment.

Proof of a conspiracy to commit an offense against the State cannot establish another and distinct conspiracy, namely, one to commit an offense against the United States.

The object of the conspiracy must be proved as laid in the indictment.

Evans *vs.* People, 90 Ill., 384;
4 Lawson's Cr. Def., 524, 528.

The conspiracy itself must be proved, as alleged, by clear and satisfactory evidence. Accused must be guilty of the offense as charged, or conviction cannot be sustained.

Id., 530.

Opposing counsel maintains that his contention is supported by the case of In re Coy, 127 U. S., 731. That case was reviewed in Pettibone *vs.* United States at pages 208-209, and later in the case of Blitz *vs.* United States, 153 U. S., 308.

In that case Mr. Justice Harlan delivered the opinion of the Court, and at page 314, after referring to In re Coy, 127 U. S., 731, 754, 755, said; " It is not to be inferred from the " decision in that case that Section 5511 is applicable to " any act or omission of duty upon the part of an officer of " election, or of a voter or other person, except such act or " omission of duty as affected or might affect the integrity " of the election for a Representative in Congress. The con- " spiracy charged in that case did imperil the integrity of

" the vote for Representative in Congress, because the re-
" turns of the election related to Representatives in Con-
" gress as well as to State officers, and were liable to be
" falsified if they passed, before certificates of election were
" issued, into the hands of unauthorized persons. But this
" reasoning has no opplication to the present case. Voting,
" in the name of another, for a State officer, cannot possibly
" affect the integrity of an election for Representative in
" Congress. With frauds of that character the national
" government has no concern, and, therefore, an indictment
" under Rev. St. Section 5511 for knowingly personating
" and voting under the name of another, should clearly
" show that the accused actually voted for a Representative
" in Congress, and not simply that in voting he falsely per-
" sonated another at a general election at which such
" Representative was or could have been chosen. In cases
" like the present one, it should not be left in doubt, or to
" mere inference, from the words of the indictment,
" whether the offense charged was one within Federal cog-
" nizance."

This decision is in harmony with the case of Pettibone *vs.* United States, supra.

In the dissenting opinion of Mr. Justice Brewer in the Pettibone case, at page 213, In re Coy is referred to. and it is said; " Mr. Justice Field alone dissented from the opin-
" ion in that case, holding that, as it is insisted here, there
" should be a specific charge of a conspiracy to do some-
" thing affecting the election of the Federal officer. I quote
" this from his opinion; 'The indictment in this case
" 'charges a conspiracy to induce certain election officers

" 'appointed under the laws of Indiana to commit a crime
" 'against the United States, the crime being the alleged
" 'omission by them to perform certain duties imposed by
" 'the laws of that State respecting elections. But it con-
" 'tains no allegation that the alleged conspiracy was to
" 'affect the election of a member of Congress, which, as
" 'said above, appears to me to be essential to bring the
" 'offense within the jurisdiction of the Court. If the con-
" 'spiracy was to affect the election of a State officer, no
" 'offense was committed cognizable in the District Court
" 'of the United States. If it had any other object than to
" 'affect the election of a member of Congress, it was a
" 'matter exclusively for the cognizance of the State
" 'Courts.' It seems to me that in this opinion the Court
" endorses the views expressed by Mr. Justice Field in that
" dissent, and then repudiated by a majority of the Court."

Not only did the Court adopt the reasoning of the dissenting opinion of Mr. Justice Field in the case of In re Coy, but in the later decision in the case of Blitz *vs.* United States, supra, the Court, without any dissenting opinion, also adopted the reasoning of the dissenting opinion of Mr. Justice Field.

Counsel for defendant in error in his argument at page 16 says that the Court did not err in sustaining plaintiff's objection to defendant's offer to introduce the record of the conviction of the witness A. M. St. Clair, for the purpose of impeaching the witness, on the ground that it was not proper cross-examination, and collateral and irrelevant.

In the case of People *vs.* Chin Mook Sow, 51 Cal., 597, it was held that a witness, on cross-examination, may be

asked if he has not been convicted of a felony, and the party asking the question may also introduce the record of his conviction; and in the same case it was held that a matter is not collateral where the party asking the question would have the right to prove it as an independent fact. Under the common law rule a party could only prove a conviction by the record.

Opposing counsel contends that the question as to whether the verdict is contrary to the evidence is one which cannot be considered by the Appellate Court if there is any evidence proper to go to the jury in support of the verdict, and cites Crumpton *vs.* United States, 138 U. S., 361. (Argument of counsel for Defendant in Error p. 21.)

We contend that there was no evidence proper to go to the jury in support of the verdict. There was no evidence at all to support the charge of conspiracy alleged in the first count of the indictment, and we do not understand that opposing counsel claims there was any evidence to support the first count, unless evidence of the other conspiracy is sufficient to support it.

In conclusion, we respectfully submit that the defendants did not have a fair and impartial trial under the law, and that the trial Court had no jurisdiction over the defendants or the subject matter of the action.

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